U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: January 26, 1999

Case No.: 1996-INA-0268

In the Matter of:

ALSUNA'S CARIBBEAN AMERICAN CAFE,
Employer

On Behalf Of:

PATRICIA KATHLEEN BERNARD JOSEPH,
Alien

Certifying Officer: Dolores DeHaan, Region II
Appearance: Henry Spar, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 22, 1994, Alsuna's Caribbean American Cafe ("Employer") filed an application for labor certification to enable Patricia Kathleen Bernard Joseph ("Alien") to fill the position of Bread & Pastry Baker West Indian Specialty (AF 4-5). The job duties for the position are:

> Measure/Mix ingredients to bake Trini Bread, Hard Dough, Whole Wheat and Coco Breads, Bagels, Rolls, Sweet Potato [sic] and Coconut Custard Pies, Carrot loaf, Bread Pudding, Buns, Totaes, Bulla, and Rum Cake. Prepare fillings and decorate cakes and pastries.

The minimum requirements for the position are completion of eight years of grade school and two years experience in the job offered. (AF 5). A special requirement of "written verifiable references" is also given. (AF 5).

The CO issued a Notice of Findings on September 21, 1995 (AF 45-48), proposing to deny certification on the grounds that Employer failed to document a lawful, job-related reason for rejecting a U.S. worker, 20 C.F.R. 656.21(b)(6), and that Employer failed to document that its attorney, who interviewed U.S. worker applicants, normally interviews or considers applicants for Employer, 20 C.F.R. 656.20(b)(3).

The CO questioned whether Employer rejected a qualified U.S. worker, Mr. Bruce Williams Joe, in violation of 656.21(b)(6). (AF 46-47). The CO noted that Joe's cover letter indicates "experience as a Baker, West Indian Style, in addition to ten (10) years experience as an Executive Chef of West Indian Restaurants. (AF 47). The CO acknowledged Employer's concern over an apparent discrepancy on Joe's resume, but stated there might be a valid reason for the incongruity. (AF 46). The CO directed Employer to document "the validity of his actions in rejecting a qualified U.S. applicant...." (AF 46).

The CO also questioned whether Employer's attorney had, in violation of 656.20(b)(3)(i), interviewed U.S. workers who applied for the job (AF 46). The CO noted that Mr. Joe's comments to the state agency make "it ... apparent that [Employer's] attorney interviewed [Mr. Joe]" (AF 46). The CO directed Employer to submit evidence that Employer's attorney normally interviews applicants for Employer's job opportunities such as that offered to the Alien, but which do not involve labor certification (AF 46).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Accordingly, Employer was notified that it had until October 26, 1995 to rebut the proposed findings or to cure the defects noted (AF 48).

In its rebuttal, dated October 16, 1995 and received by the CO on October 20, 1995, Employer argues that Mr. Joe was rejected for a lawful, job-related reason and that Employer's attorney routinely interviews job applicants for Employer (AF 54-64). Employer argues that Mr. Joe does not posses the experience required to fill the position. According to Employer, both Mr. Joe's resume and statements he made during his interview indicate that he lacked the required experience as a West Indian Style Pastry Chef (AF 57-59). Employer also claimed that Mr. Joe offered to provide a reference from a past employer but failed to do so (AF 55). Employer stated that it had contacted the past employer, who was unable to verify Mr. Joe's employment due to a change of ownership (AF 55). Employer contends that because it "could not verify that Bruce Joe worked even 'one day' as a West Indian Style Baker," it had a lawful, job-related reason for rejecting Mr. Joe (AF 55).

Employer also contends "[t]hat the attorney has been hired by the Employer" and "is not an agent of the alien" (AF 63). Employer stated that it "regularly requests and retains the attorney to perform legal and non-legal services ... which include ... employee recruitment" (AF 62-63). Employer noted that it currently employs several individuals who were considered and interviewed by the attorney for employment which did not involve the Labor Certification process. (AF 62). Employer further noted that "the Attorney has been and continues to be retained by the Employer as a business consultant in regards to most transactions involving the Employer, including employee recruitment" (AF 61). Employer "respectfully submitted that the Attorney qualifies as the Employer's representative as described in 20 C.F.R. [656.20](b)(3)(ii)...." (AF 60).

Employer's rebuttal was printed on stationary bearing the letterhead "Law Offices Harry Spar, P.C," signed by Bradford Bernstein of that same law firm, and subscribed by Employer (AF 54).

The CO issued the Final Determination on November 20, 1995 denying labor certification on the grounds that Employer failed to sufficiently rebut the finding that it had violated 20 C.F.R. 656.20(b)(3)(i) by having its attorney interview applicants for the job (AF 65-67). While acknowledging Employer's rebuttal argument to the contrary, the CO stated that "[b]ased on [the] evidence in the case file, it appears that the attorney of record is representing both the employer and the alien." (AF 65). The CO specifically noted that the application was signed by both the attorney and the Alien, on forms ETA 750A and ETA 750B, respectively. (AF 65). The CO further noted that the attorney signed a letter, dated August 19, 1994, in which he referred to his "notice of Appearance [G-28] as Attorney for the parties." (AF 6). The CO found the bare assertion in the rebuttal that the attorney routinely handles employee recruitment for Employer to be unconvincing. (AF 65). Based on this evidence, the CO "held that the attorney for [Employer] is actually representing both the employer and the alien," and therefore denied the application (AF 65).

On January 10, 1996, the Employer requested review of the Denial of Labor Certification (AF 77-84). The CO denied reconsideration on April 1, 1996, and on April 4, 1996, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. *Haddad*, 96-INA-1 (Sept. 18, 1997). In the instant case, the CO made the factual findings that Employer's attorney represented the Alien during the application process and that Employer's attorney does not normally interview, on behalf of Employer, applicants for job opportunities such as that offered to the Alien but which do not involve labor certification. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Unless evidentiary form is specified by the regulations or the CO's request, "written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation." *Gencorp*, 87-INA-659 (Jan. 13, 1988). However, "[t]his is not to say that a CO must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve." *Id*. In this case, the sum of the evidence in support of Employer's contention that the attorney is regularly involved in employee recruitment consists of statements to that regard in the rebuttal letter. That letter was signed by the attorney and subscribed by Employer. The rebuttal states that several of Employer's current employees were hired by the attorney, but neither names those employees nor identifies their positions. The rebuttal also states that the attorney has conducted extensive recruitment for other businesses, but identifies neither those businesses nor the types of positions involved. Given the improbability of an attorney being routinely involved in employee recruitment, especially for non-management or professional positions, evidence adequate to support the CO's findings exists in the record. The Board, therefore, affirms the factual findings of the CO in this matter.

In order to protect U.S. workers, the alien, the alien's agent, and the alien's attorney are prohibited from interviewing or considering U.S. workers for the job offered to the alien. 20 C.F.R. 656.20(b)(3)(i). This prohibition does not apply to persons who normally interview or consider, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certification. 20 C.F.R. 656.20(b)(3)(ii). As discussed above, we affirm the CO's factual findings in the present case as they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. Employer has failed to demonstrate that its attorney qualifies for the exception at

Section 656.20(b)(3)(ii) to the prohibition at Section 656.20(b)(3)(i) on the involvement of the Alien's agent or attorney in the interviewing or consideration of U.S. workers. Therefore, the CO properly denied Employer's application for alien labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.